

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

AT&T CORP. and ALASCOM, INC. d/b/a
AT&T Alascom, Inc.,

Plaintiffs,

v.

DAVID W. WALKER, DONALD J.
SCHROEDER, and TERRY A. GUNSEL,

Defendants.

TERRENCE J. DONAHUE, Trustee for
Chapter 7 Bankruptcy Estate of PT cable, Inc.

Plaintiff-in-Intervention,

v.

THE CARLYLE GROUP, L.P., a.k.a. The
Carlyle Group; *et al.*

Defendants-in-Intervention.

Case No. C04-5709FDB

ORDER GRANTING IN PART AND
DENYING IN PART MOTION OF
DEFENDANTS NEPTUNE
COMMUNICATIONS, LLC AND
NEPTUNE GLOBAL SYSTEMS, LLC
TO DISMISS THE COMPLAINT IN
INTERVENTION

1 Defendants Neptune Communications, LLC and Neptune Global Systems, LLC (U.S.) move
2 to dismiss the complaint in intervention, specifically as to the claims under the Delaware dividends
3 statute, the fraudulent transfer claim, the aiding and abetting a violation of the Delaware dividend
4 statute, the claim for aiding and abetting a breach of fiduciary duty, and the alter ego liability claim.
5 Each of Defendants arguments will be examined in turn.

6 **1. Unlawful Dividend (Cause of Action No. 1)**

7 Defendants Neptune Communications, LLC (NCLLC) and Neptune Global Systems, LLC
8 (NGS) argue that as non-directors of Neptune Pacific Holdings (NPH) they cannot be held liable
9 under the Delaware dividend statute which specifically exempts any “director who may have been
10 absent when the [distribution was declared] or who may have dissented from the action resolution by
11 which the [distribution was declared]... .” Del. Code tit. 8, § 174(a). Defendants also argue that
12 they also are not liable as recipients of NPH’s dividend payments.

13 The Trustee responds that he does not seek to impose “director liability as to the unlawful
14 dividends on NCLLC or NGS, but the Trustee argues that numerous cases have recognized an
15 implied cause of action under 8 Del. Code. Ann. § 174 against such shareholders. *See, e.g., In re*
16 *Kettle Fried Chicken of America, Inc.*, 513 F.2d 807 (6th Cir. 1975); *In re Sheffield Steel Corp.*, 320
17 B.R. 405, 414-15 (Bankr. N.D. Okla. 2004).

18 The Court agrees with the Trustee and will deny the motion as to this claim.

19 **2. Fraudulent Transfer (Cause of Action No. 3)**

20 Defendants move for dismissal of the fraudulent transfer cause of action because it cannot be
21 determined whether the Trustee seeks to hold NCLLC and NGS liable on this claim and because the
22 Trustee fails to sufficiently allege the basis for his standing by not alleging the identify of the
23 unsecured creditor whose rights he is asserting nor identifying the specific state statute supporting
24 this claim. Defendants also argue that this claim is time-barred.

1 The Trustee argues, and the Court agrees that he has sufficiently detailed the “who, what
2 when, where, and how” of the loan and dividend transactions at issue. As to the identity of the
3 creditor into whose shoes the Trustee steps, the Court agrees with the Trustee that the better
4 authority hold that notice pleading does not require specifically naming the § 544(b) creditor(s). *See*
5 *In re Lexington Healthcare Group, Inc.*, 339 B.R. 570, 576 (Bankr. Del. 2006). The Court also
6 agrees with the Trustee that he need not specify the particular state’s statute under which the
7 transactions are fraudulent transfers. *Ghebreselassie v. Coleman Security Service*, 829 F.2d 892,
8 895 (9th Cir. 1987), *cert. denied*, 487 U.S. 1234 (1988).

9 The Trustee does not oppose dismissal of the constructive fraudulent transfer claims.

10 As to the actual intent fraudulent transfer claim, notwithstanding the Defendants contentions
11 that the lender creditors were aware of the dividends when they were distributed in 1999 and that the
12 carrier creditors learned of the notes and dividends in discovery in March 2003, the Trustee does
13 oppose dismissal. The actual intent fraudulent transfer claim is not time-barred, as the Trustee has
14 pled the existence of an unsecured creditor with standing to pursue this claim. The motion to dismiss
15 on this basis will be denied.

16 **3. Aiding and Abetting An Illegal Dividend (Cause of Action No. 4)**

17 The Trustee does not oppose dismissal of this claim, and Defendant’s motion will, therefore,
18 be granted as to this claim.

19 **4. Aiding and Abetting Breach of Fiduciary Duty (Cause of Action No. 5)**

20 Defendants argue for dismissal of this claim as untimely under Delaware’s three-year statute
21 of limitations, as the claim had to have been filed no later than June 2002 (for the \$43 million
22 dividend) or December 2002 (for the \$1.25 million dividend). Also, Defendants argue that both
23 primary and aiding and abetting for the same fiduciary breach and one cannot aid or abet oneself, that
24 there is no allegation of knowing participation, and since there is no primary claim for aiding and
25 abetting and there can be no aiding and abetting.

1 The Trustee responds that he has alleged an abuse of fiduciary relationship through actionable
2 self dealing and also alleges concealment of the Defendants' activities such that creditors did not
3 learn of facts surrounding the loan and dividend transactions at any time prior to the bankruptcy
4 petition. Thus, as there are three forms of equitable tolling of the statute of limitations: (1) the
5 doctrine of inherently unknowable injuries; (2) the doctrine of fraudulent concealment; and (3) the
6 doctrine of equitable tolling, and the allegations may support one or more of these bases, the cause
7 of action should not be dismissed.

8 Also, the Trustee state that he has pled only aiding-and-abetting liability against NCLLC and
9 NGS, not primary liability for breach of fiduciary duty.

10 The Court agrees with the Trustee and will deny dismissal of this claim. The Court also
11 notes that a primary breach of fiduciary duty claim is sufficiently stated in the Trustee's Complaint at
12 Cause of Action No. 2. Defendants' argument imputing the directors' knowledge to PTC is not
13 compelling under the circumstances alleged, and the Trustee has sufficiently alleged knowing
14 participation to avoid dismissal.

15 **5. Alter Ego Claim**


16 Defendants argue for dismissal of this claim arguing that the exceptional circumstances for
17 disregarding the corporate form have not been alleged and that the claim is purely speculative.

18 The Trustee counters that the assertion that the Defendants asserted domination and control
19 over the predecessor to the debtor, which domination and control was used to cause the debtor to
20 make transfers for the benefit of the controlling parties an detriment of the debtor adequately states
21 an alter ego theory of liability for Rule 12(b)(6) pleading purposes. *See In re Buckhead America*
22 *Corp.*, 178 B.R. 956, 974-75 (D. Del. 1994).

23 There are sufficient recitations in the Complaint as a whole to support the Alter Ego Claim,
24 and this cause of action will not be dismissed.

1 NOW, THEREFORE, IT IS ORDERED: Other than the claims for aiding and abetting illegal
2 dividend and for constructive fraudulent transfer, which are unopposed by the Trustee and are,
3 therefore, GRANTED, the Motion of Defendants Neptune Communications, LLC and Neptune
4 Global Systems, LLC to Dismiss the Complaint in Intervention [Dkt. # 103] is DENIED.

5
6 DATED this 17th day of October, 2006.

7
8 
9 FRANKLIN D. BURGESS
10 UNITED STATES DISTRICT JUDGE
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26